No. 14,523

United States Court of Appeals

For the Ninth Circuit

TRANS WORLD AIRLINES, INC.,
a corporation,
Appellant,

vs.

CITY AND COUNTY OF SAN FRANCISCO,
a municipal corporation, et al.,
Appellees.

BRIEF FOR APPELLEES.

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Subject Index

Table of Authorities Cited

Statutes

Texts

Miscellaneous

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BRIEF FOR APPELLEES.

JURISDICTIONAL STATEMENT.

This is an appeal from a decree entered on July 2, 1954, by the District Court for the Northern District, Southern Division, denying plaintiff-appellant declaratory and injunctive relief and awarding defendant-appellee on its cross-complaint declaratory relief and money judgment in the sum of $95,942.64. The District Court's jurisdiction was founded on 28 U.S.C. 1332.[1]

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[1]For convenience, the parties will hereafter be referred to as "TWA and the "City". All emphasis supplied unless otherwise noted.

It is admitted in the pleadings that TWA is a Delaware corporation (Tr. 3); that the City is a municipal corporation, duly organized and existing under and by virtue of the laws of the State of California (Tr. 4); and that the amount in controversy exceeds $3,000.00 (Tr. 3-4). This Court's jurisdiction rests on 28 U.S.C. 1291, 2201.

STATEMENT OF THE CASE.

In 1926 the voters of the City and County of San Francisco approved an appropriation of $100,000.00 for the construction of an airport. From that relatively humble beginning, there has been created on about 4,000 acres, the San Francisco International Airport at a cost to the taxpayers of this City of approximately $50,000,000.00.

Four times, in the ownership and operation of this airport, the City has expanded and rebuilt this utility, to accommodate larger and heavier aircraft progressively put in use by air carriers, including TWA.

In 1942 there were no aircraft operated by scheduled air lines in the United States exceeding 25,500 pounds in weight (Tr. 476). In 1947 the initial Constellation plane placed in service by TWA weighed approximately 77,000 pounds (Tr. 470). In 1952 Constellation planes were regularly operated by TWA at San Francisco Airport of a maximum gross weight of 120,000 pounds (Tr. 470). A Lockheed Constellation of a maximum weight of 130,000 pounds was as

of the time of the trial of this action contemplated to be utilized in service (Tr. 471).

In 1942 the capital investment at the airport amounted to $2,900,000 (Tr. 345). In October, 1953, the capital investment at the airport amounted to approximately $40,000,000.00 (Tr. 345). Between October, 1942, and December, 1951, approximately $24,000,000.00 was expended in repairing common use facilities at the airport (Tr. 528) and a major portion of this expenditure was for the purpose of lengthening and strengthening the runways at the airport in order to safely accommodate planes of increased weight (Tr. 520, 521, 523, 525).

Today the City is confronted with TWA's idea that it is not susceptible to utility rates for common use facilities that apply to all airline carriers entering and using the San Francisco International Airport.

The City maintains that in the operation of the airport it is conducting a public utility and must as a matter of law treat all users of the airport on an equal basis.

On the 23rd day of June, 1941, the City promulgated and passed a schedule of rates, after due notice by publication and hearing, that were thereafter incorporated verbatim into the lease agreement with TWA. As far as TWA is concerned, it is a public record that the Public Utilities Commission of the City and County of San Francisco[2] had exercised its

[2]The Public Utilities Commission of the City and County of San Francisco was created pursuant to Section 120 of the City's Charter

legislative power and had promulgated and passed utility rates for common use facilities at the airport (Exh. R-1, R-2, R-3, R-4, Tr. 623).

The enactment of said schedule of rates and charges was made pursuant to the provisions of Section 130 of the Charter of the City and County of San Francisco, after publication in the official newspaper for five days of notice of intention so to do, and after public hearing held not less than ten days after the last publication. In accordance with the notice, the Public Utilities Commission of the City and County of San Francisco adopted a schedule of rates and charges to be paid by aircraft lines for use of common use facilities at the San Francisco Airport. The Board of Supervisors, in accordance with the Charter section, approved the schedule of rates and charges on June 30, 1941, and the same was placed in effect by the Public Utilities Commission on July 1, 1941.

In 1946, the City again promulgated a schedule of rates and charges, after due notice by publication and hearing, in accordance with Charter Section 13((Exh. S-1, S-2, S-3, S-4, Tr. 624).

(effective January 8, 1932). Under Section 121 of the Charter the Commission has the control and management of municipally owned utilities. This Commission is distinct and separate from the public Utilities Commission of California. The Railroad Commission of the State of California was continued in existence as the Public Utilities Commission of the State of California by amendment to Article XII, Section 22 of the California Constitution adopted November 5, 1946. The Public Utilities Commission of California does not govern rates and charges of municipally owned utilities of San Francisco. See more details in Section II of this brief.

On November 12, 1950, the Public Utilities Commission adopted a schedule of rates and charges, again after due notice by publication and hearing, for the common use facilities, in accordance with Section 130 of the Charter. Said schedule was approved by the Board of Supervisors and became effective on January 1, 1951 (Exh. E, Tr. 55; Exh. T-1, T-2, T-3, T-4, Tr. 625).

In 1942, the agreement now before the Court was entered into between City and TWA, whereby certain lands were leased to TWA for a period of twenty years. Incorporated in the agreement was this provision, and it is fully set forth hereafter to emphasize its importance in the controversy at bar. Section 3 of the agreement states:

> "Lessor further demises and lets unto Lessee the use, in common with others authorized so to do and on the same terms and conditions as apply to others, of any and all general facilities, improvements, equipment and services which have been or may hereafter be provided at said San Francisco Municipal Airport, including, but without limitation, the landing field, runways, aprons, taxi-ways, sewerage and water facilities, marker and surface lights, floodlights, landing lights, signals, beacons, aids, control tower, and other conveniences for loading, flying, landings, and takeoffs; and the causeways, docks, wharves and approaches thereto, parking areas, roads, streets, bridges, spur tracks, and other facilities and appurtenances of said Airport, for the Lessee, its employees, passengers, guests, vendors and con-

tractors, patrons, and invitees, which use, without limiting the generality thereof, shall include (all of said facilities to be used and occupied in accordance with the rules and regulations of said Airport):"

TWA refuses to recognize the significance of the conditions of Section 3 of the agreement.

Twelve (12) airline carriers, as well as non-scheduled airlines and privately owned planes, are using the common use facilities (Tr. 373; 360, 361) at the San Francisco International Airport under the schedule of rates and charges of 1951, with the exception of TWA and United Air Lines (the United case is also being contested in the District Court). Paying for the common use facilities under the rates and charges promulgated by the Public Utilities Commission is recognized by the airline carriers (other than TWA and United) as well as non-scheduled airlines and privately owned planes.

TWA assumes the position that it is entitled to preferential treatment and that it is not subject to the rates and charges duly enacted by the Public Utilities Commission and the Board of Supervisors that became effective January 1, 1951, because of the agreement of 1942.

The City, on the other hand, states that in the operation of the airport it is conducting a public utility and that all air carriers must be treated alike in the payment of rates and charges for the use of the common use facilities.

Further, the City maintains that, regardless of a purported special contract, all airline carriers are entitled to equal and non-discriminatory rates for common use facilities. An unfair preference in the fixation of rates would exist if one airline carrier could say to its next door competitor, "Our rates for common use facilities are different (lower) from those imposed upon your operation."

Upon the face, such practice is at variance from the fundamental rule applicable to public utilities. That rule is that consumers must be treated alike, and any transaction creative of discrimination or design to place consumers upon an unequal footing is stamped as void.

QUESTIONS PRESENTED.

The City feels that the District Court simplified the questions to be considered by this Honorable Court. The City accepts the District Court's opinion and relies upon its conclusions and the judgment rendered in the instant matter. (The District Court's opinion, *Trans World Airlines vs. City and County of San Francisco,* 119 F. Supp. 516, is printed in the Appendix to this brief.)

Summarized, the issues are reduced to the following propositions:

(1) The operation of common use facilities at the airport is a public utility business.

(2) The Public Utilities Commission of the City and County of San Francisco is the rate fixing body

and its rate fixing power is fully equivalent in legal effect to the exercise of such power by any rate fixing body.

(3) The law does not permit departure from this regular schedule of rates and charges by either previous or subsequent contract.

(4) The terms of the TWA agreement are such as to subject rates and charges for common use facilities to the general schedule of rates and charges in effect at the airport.

ARGUMENT.

I.

THE OPERATION OF COMMON USE FACILITIES IS A PUBLIC UTILITY BUSINESS.

In the total design of the airport, common use facilities are installed, which are available in the operation of all aircraft. These are the runways, where airplanes land and take off; the loading aprons or ramps, where passengers and cargo are taken on and discharged; and the taxiways, which connect the runways with the loading aprons or ramps; the lighting system, and the public address system (Tr. 359, 360). The right of TWA to utilize the facilities just mentioned is set forth in Section 3 of the Lease "in common with others authorized so to do and *on the same terms and conditions as apply to others.*"

In Section IV of this brief, we point to the precise language of the TWA lease disclosing the absence of

intent to "freeze" the charges for these common use facilities. Conceding, however, for the purpose of present argument, that there was such intent, the law is clear that the attempt to "freeze" the charges is void.

Mindful of the force of this broad principle of public utilities law — that all customers must be treated alike—the main endeavor of TWA is to negate the presence of a public utility function. This is easily met.

A. Charter Provisions Establish Airport as Public Utility.

Section 120 of the Charter of the City and County of San Francisco creates a public utilities commission in the municipal government of the City and County of San Francisco.

Section 121 of the *Charter* provides in part that:

> "The public utilities commission shall have charge of the construction, management, supervision, maintenance, extension, operation and control of all public utilities and other properties used, owned, acquired, leased or constructed by the city and county, *including airports,* for the purpose of supplying any public utility service to the city and county and its inhabitants, to territory outside the limits of the city and county, and to the inhabitants thereof."

Section 122 of the *Charter* enacts that utilities therein named, among which is the airport, "shall each be designated as a department under the commission."

Section 125 of the *Charter* provides, in part:

> "The public utilities commission shall have jurisdiction over the airport now being conducted by the City and County of San Francisco, . . ."

The airport being conducted at the time of the adoption of the present San Francisco Charter, going into effect January 8, 1932, is the present San Francisco International Airport. As heretofore pointed out, this airport was started in the year 1926. There can be no doubt, therefore, that the airport has been designated as a public utility by Charter.

Even in the absence of such Charter provision the ordinary rule of law is that the operation of an airport is the operation of a public utility. This will amply be demonstrated in the authorities to follow.

B. Number of Patrons Does Not Determine Public Utility.

Since the activity at the airport is in the public utility field, it follows that the customers, in patronage of that utility, must be the airlines themselves—twelve scheduled airlines, non-scheduled or irregular airlines, and owners of private planes (Tr. 373; 360-361).

From the scope of operations, a public utility may be limited in the number of persons who are entitled to be served. From the nature of the service rendered, the persons who are in a position to require the same may be few in number.

As stated in *Terminal Taxicab Company v. Kuntz* (1916), 241 U. S. 252, 60 L. Ed. 984, the Court at page 253 stated as follows:

"The next item of the plaintiff's business, constituting about a quarter, is under contracts with hotels by which it agrees to furnish enough taxicabs and automobiles within certain hours reasonably to meet the needs of the hotel, receiving the exclusive right to solicit in and about the hotel, but limiting its service to guests of the hotel. We do not perceive that this limitation removes the public character of the service, or takes it out of the definition in the act. No carrier serves all the public. His customers are limited by place, requirements, ability to pay, and other facts. . . ."

The persons using the service may be few in number (*Camp Rincon Resort Company v. Eshleman* (1916), 172 Cal. 561, 185 P. 186). Indeed, the fact that only one person uses the service rendered does not control the question. In *Ford Hydro-Electric Company v. Town of Aurora* (1932), 240 N.W. 418, 206 Wis. 316, the Court stated as follows at page 420:

"It is next contended that the mere fact that a plant has only one customer or a few customers does not prevent it from being a public utility, provided the plant is built and operated for furnishing power to the public generally. To this proposition Cawker v. Meyer, 147 Wis. 320, 133 N. W. 157, 158, 37 L. R. A. (N. S.) 510, is cited. . . . The court says: 'The use to which the plant, equipment, or some portion thereof is put must be for the public, in order to constitute it a public utility.' It is stated, however, that 'whether or not the use is for the public does not necessarily depend upon the number of consumers; for there may be only one, and yet the use be for the pub-

> lic, as where a plant is built and operated for furnishing power to the public generally, but for a time finds one consumer who uses it all. If the product of the plant is intended for and open to the use of all the members of the public who may require it, to the extent of its capacity, the fact that only one or two thereof consume the entire product renders the plant none the less a public utility.'
>
> This case furnishes the test to be applied in ascertaining whether plaintiff was a public utility. The fact that it serves a single customer is not determinative. The question is whether the plant is built and operated to furnish power to the public generally. If it is, then the fact that it has presently only a single customer will not prevent it from being a public utility.''

The factor, as far as the public is concerned, which determines whether an agency is a public utility, is whether all persons, many or few, corporate or individual, who, *from the nature of the service rendered* are in a position to require it, have the right to be supplied with the service on equal terms (*Allen v. R. R. Commission* (1918), 179 Cal. 68, 88, 175 P. 466).

TWA co-mingles so many argumentative points under specific topics that it is difficult to follow the confused reasoning employed in its endeavor to avoid the fundamental issue at bar.

Illustration of the confused reasoning employed by TWA is contained in Argument II, page 44 of its brief, we quote:

> "The airport's primary public is not a dozen airlines, but is the air-traveling public—2,500,000 air passengers in and out of San Francisco in 1952 (Tr. 374). The charges of the scheduled airlines are regulated by the Public Utilities Commission of California as to intrastate traffic and by the Federal Civil Aeronautics Board as to interstate traffic (*People v. Western Air Lines, Inc.* (1954), 42 Cal. 2d 621, 268 P. 2d 723; 49 U.S.C. 642)."

The city has heretofore shown that the operation of a utility is not measured by numbers of patrons, but rather that the utility is available to all users upon a non-discriminatory basis. One patron or many may be entitled to the right to be serviced by the utility.

TWA's assertion that the city's primary public are the 2,500,000 air passengers in and out of San Francisco is fallacious. On page 7 of TWA's brief, TWA contradicts itself by stating that the 2,500,000 people were airline passengers. In other words, this huge number of patrons belong to the common air carriers and were to be serviced by them. TWA would have the Court believe that the city was the "utility carrier" of these 2,500,000 passengers in 1952. Then, TWA states that under *People v. Western Airlines Inc.* (1954) 42 Cal. 2d 621, 268 P. 2d 723, 49 U.S.C. 642, the power to regulate passenger fares in intrastate traffic is regulated by the Public Utilities Commission of the State of California.

At no time, throughout this proceeding, has the city stated a right to regulate fares of air passengers.

It has and does recognize the air passengers as patrons of the air carriers in international, national and intra-state traffic that the fares for such passengers are set by either the California Commission or the Civil Aeronautics Board.

The City has nothing to do with any passenger of any carrier. It does not operate or manage the airplanes, ticket counters, or baggage, issue transportation accommodations, engage or manage carrier personnel, or any feature of air transportation. On the other hand, the City owns, maintains, regulates and manages an airport for all air carriers to land and take off with passengers who have employed the carriers to transport them to a given destination. The City cannot discriminate as to the air carriers which can land and take off from its airport. The airport is open to all air carriers on a non-discriminatory basis.

C. Court Decisions Uniformly Declare Operation of Airport to Be a Public Utility Activity.

In every case in which the question has been presented, the Courts have held that a municipal airport is a public utility.

State ex. rel. City of Lincoln v. Johnson (1928), 117 Neb. 301, 220 N. W. 273, 274;

State v. Jackson (1929), 121 Ohio St. 186, 167 N. E. 396;

Price v. Storms, et al., Board of Trustees, Town of Okemah (1942), 191 Okla. 410, 130 Pac. 2d 523;

Jones v. Keck (1946), 74 Ohio App. 549, 74 N. E. 2d 644, 646;

City of Toledo v. Jenkins (1944), 143 Ohio St. 141, 54 N. E. 2d 656;

State v. Board of County Commissioners (1947), 149 Ohio St. 583, 79 N. E. 2d 698, 703.

In *State v. Jackson, supra* (an action to compel the City of Canton, Ohio, to submit to referendum an ordinance authorizing city officials to purchase land as site for airport) the Court, at page 396, stated as follows:

> "Manifestly no argument is necessary to show that a landing field for aircraft is a public utility. If it were not a public utility, the Legislature would have no power to make provision for purchase and condemnation of lands for such purposes. It being a public utility, the question of the right to a referendum has already been settled by this court in State ex rel. Diehl, Jr. v. Abele, 119 Ohio St. 210, 162 N.E. 807, decided June 20, 1928."

In *Jones v. Keck, supra,* the Court, at page 646, stated as follows:

> "Section 3939, General Code, gives a municipal corporation the right to acquire, construct, maintain and operate airports and landing fields. Such airports and landing fields are of the character of public utilities and all laws applicable to municipally owned utilities are applicable to such airports and landing fields. State ex rel. Chandler v. Jackson, 121 Ohio St. 186, 167 N.E. 396."

In *State ex rel. City of Lincoln v. Johnson, supra,* the Court, at page 274, stated as follows:

"In a sense the Home Rule Charter is the constitution of the city. It is a frame of municipal government and is intended to be more permanent in its nature than an ordinary statute. In general features, it is in a form to meet changing conditions as they arise. An equipped aviation field in or near the city is a means of making aerial service available to passengers. The service includes the transportation of mail and freight. The field is furnished for a public purpose for which taxes may be imposed in the exercise of governmental power. In this view of the questions raised by the auditor, an equipped municipal aviation field is both a 'public service property' and a 'public utility' within the meaning of the Home Rule Charter which authorizes municipal bonds upon a majority vote."

In *City of Toledo v. Jenkins, supra,* the Court, at page 663, stated as follows:

"Section 3939, General Code, provides, inter alia:

'Each municipal corporation in addition to other powers conferred by law shall have power: * * *

'(22) to purchase, lease or condemn land and/or air rights necessary for landing fields, either within or without the limits of a municipality, for aircraft and transportation terminals and uses associated therewith or incident thereto, * * * and to improve and equip the same with structures necessary or appropriate for such purposes.'

The statutory provisions confer upon the municipal corporation power to own or lease and

operate landing fields and improve them with runways, buildings or other structures, so as to make them fully equipped aircraft and transportation terminals. As an airport of that character is a public utility (State ex rel. Chandler v. Jackson, 121 Ohio St. 186, 167 N.E. 396), the Toledo Municipal Airport was and is a complete public utility unit."

In *Price v. Storms, supra* (in which Court denied injunction against sale of lands for bonds to acquire land upon which to locate a municipal airport), the Court, at page 525, stated as follows:

"In State ex rel. City of Lincoln v. Johnson, State Auditor, 117 Neb. 301, 220 N.W. 273, it is held that an equipped municipal aviation field is both a public service property and a public utility and the establishment of such a field is a governmental purpose for which bonds may be voted and taxes levied and collected. Plaintiffs cite no case from a court of last resort holding that an airport is not a public utility and we have found none. It is a matter of common knowledge that municipally owned airports are now being operated throughout our country."

II.

THE PUBLIC UTILITIES COMMISSION OF THE CITY AND COUNTY OF SAN FRANCISCO IS THE RATE FIXING BODY AND ITS RATE FIXING POWER IS FULLY EQUIVALENT IN LEGAL EFFECT TO THE EXERCISE OF SUCH POWER BY ANY RATE FIXING BODY.

A. Municipality Has Power to Fix Rates for Municipally Owned Utilities.

In California a municipality has the power to fix rates and charges of municipally-owned utilities.

Durant v. City of Beverly Hills (1940), 39 Cal. App. 2d 133, 102 Pac. 2d 759;

Jochimsen v. City of Los Angeles (1921), 54 Cal. App. 715, 202 Pac. 902;

Bowles v. City and County of San Francisco (1946), 64 Fed. Supp. 609;

City of Pasadena v. Railroad Commission (1920), 183 Cal. 526, 192 Pac. 25.

The Court, in *Durant v. City of Beverly Hills,* at page 137, stated as follows:

> "The power of the city to fix rates to be charged those customers residing within its boundaries is incidental to the power to 'establish and operate' public utility systems conferred by section 19 of article XI of the Constitution. This power to fix the charges for service by the municipality when operating a municipally owned public utility is not controlled by section 23 of article XII of the Constitution. (City of Pasadena v. Railroad Com., 183 Cal. 526, 534 [192 Pac. 25, 10 A.L.R. 1425]; Jochimsen v. Los Angeles, 54 Cal. App. 715, 716 [202 Pac. 902].) The power of the city to furnish services to inhabitants

outside its boundaries is a part of the constitutional grant found in section 19 of article XI, wherein the city is authorized to establish and operate the utility; and since the operation of the system in the outside territory is but incidental to the main purpose of service to the inhabitants of the city, it follows as of course that the municipal authorities enjoy the same right to fix the charges to be paid by those served in the outside territory as it has to fix those charged its own inhabitants."

Section 130 of the Charter of the City and County of San Francisco provides in part as follows:

"The commission shall have power to fix, change and adjust rates, charges or fares for the furnishing of service by any utility under its jurisdiction, and to collect by appropriate means all amounts due for said service, and to discontinue service to delinquent consumers and to settle and adjust claims arising out of the operation of any said utilities.

Rates may be fixed at varying scales for different classes of service or consumers. The commission may provide for the rendition of utility service outside the limits of the city and county and the rates to be charged therefor which may include proportionate compensation for interest during the construction of the utility rendering such service."

Section 130 of the Charter of the City and County of San Francisco provides, then, that the Public Utilities Commission, subject to the Board of Supervisors, is empowered to establish rates and charges

for furnishing of public utilities service at the Airport, as well as the rates and charges of other utilities under its jurisdiction. Section 130 further provides that the Board of Supervisors has the duty to approve or disapprove; and, in some instances, its non-action for thirty days operates as a validation of the rates determined upon by the Commission.

No confusion should arise by reason of the coincidence that the rate-fixing body in this instance happens to be the Public Utilities Commission, also having jurisdiction over the utility itself. In the exercise of its rate-fixing power, the Public Utilities Commission of the City and County of San Francisco is acting as a public rate-fixing body even though it is at the same time engaged in a function as the operator of the utility. This was aptly said in

Connett v. City of Jerseyville (C.C.A. 7, 1940), 110 Fed. 2d 1015, 1019 (par. (5)).

> ". . . the governing body of a municipality, when fixing utility rates or charges, is performing a public function of the municipality and acting as a rate making body as distinguished from its private function as owner and operator of the utility."

In *Polk v. City of Los Angeles* (1945), 26 Cal. 2d 519, 539, 150 Pac. 2d 931, our Supreme Court states:

> "The present Railroad Commission was created by an amendment to the Constitution on October 10, 1911 (Cal. Const., Art. XII §22). Thereafter it was held that the powers conferred on the commission did not extend to the regulation of utilities operated by municipalities; that

its power of regulation was limited to privately operated public utilities; and that the Legislature could not extend that power to embrace municipally operated utilities."

43 *Am. Jur.* 624, 625, §83, states:

"The function of rate making is purely legislative in character, whether it is exercised directly by the legislature itself by the enacting of a law fixing rates or by the granting of a charter wherein the rates are regulated, or is exercised by some subordinate administrative or municipal body to whom the power of fixing rates has been delegated; in any of such cases, the completed act derives its authority from the legislature and must be regarded as an exercise of the legislative power."

McQuillin Mun. Corp., 3rd Edition, Vol. 12, p. 689:

"Otherwise stated, where the municipality owns its plant, the rates for water, light or any other product, furnished by it must be fair, reasonable and just, uniform and nondiscriminatory. The same rules enforced against public service corporations in these respects, as herein already stated, are applied with full force to the municipality."

B. No Change in Rule When Municipality Operates in Proprietary Capacity.

Stress is laid, in TWA's brief, upon the fact that the City and County in the operation of the airport acts in a proprietary as distinguished from a governmental capacity. As far as the principles of public utility law are concerned, this fact is immaterial.

Irish v. Hahn (1929), 208 Cal. 339, 281 P. 385.

In that case the Court, at page 344, stated as follows:

> "It is now generally accepted that when a municipality, lawfully so empowered, undertakes to furnish, to its inhabitants who will pay therefor, the utilities and facilities of urban life, it is thereby performing a municipal and public function. (See Pasadena v. Chamberlain, 204 Cal. 653 [269 Pac. 630]; In re Orosi Public Utility Dist., 196 Cal. 43 [235 Pac. 1004].) The fact that the function is not governmental is immaterial. It may be proprietary and still be public. The distinction between the governmental and proprietary functions was never made for the purpose of adding to or detracting from either as a public function, but for the purpose of determining the liability of the municipality in tort. (City of Pasadena v. Railroad Commission, 183 Cal. 526, 530 [10 A. L. R. 1425, 192 Pac. 25].)"

C. Municipality Has Extraterritorial Power to Fix Rates and Charges.

Section 19, Article XI, of the Constitution of the State of California provides:

> "Section 19. Any municipal corporation may establish and operate public works for supplying its inhabitants with light, water, power, heat, transportation, telephone service or other means of communication. Such works may be acquired by original construction or by the purchase of existing works, including their franchises, or both. *Persons or corporations may establish and operate works for supplying the inhabitants with such services upon such conditions and under such regulations as the municipality may pre-*

scribe under its organic law, on condition that the municipal government shall have the right to regulate the charges thereof. A municipal corporation may furnish such services to inhabitants outside its boundaries; provided, that it shall not furnish any service to the inhabitants of any other municipality owning or operating works supplying the same service to such inhabitants, without the consent of such other municipality, expressed by ordinance. (Amendment adopted October 10, 1911.)"

(See quotation from *Durant v. City of Beverly Hills* in Section A above construing Section 19, Article XI of the Constitution of the State of California.)

Further, Section 130 of the Charter of the City and County of San Francisco expressly grants to the Public Utilities Commission the right to provide for rendition of utility service outside the limits of the City and County and to prescribe rates to be charged therefor.

Further, it has been held that ordinances for the operation of an airport owned by the City in territory outside the limits of the City are valid.

Ebrite v. Crawford (1932), 215 Cal. 724, wherein the Court stated as follows at page 729:

"And it requires no great meditation to realize how strange an anomaly it would be to say that the city might own an airport adjoining its boundaries and yet be without the power to regulate the manner of its use. For other statements of the right of the city to exercise extraterritorial jurisdiction when necessary to the proper conduct of its affairs see Mulville v. City of San

Diego, 183 Cal. 734 (192 Pac. 702); 18 Cal. Jur. 803; and Case Note to Brown v. Cle Elum, 55 A. L. R., pp. 1175-1186."

III.

THE LAW DOES NOT PERMIT DEPARTURE FROM SCHEDULE OF RATES AND CHARGES BY EITHER PREVIOUS OR SUBSEQUENT CONTRACT.

A. Fixation of Rates by a Legislative Body Supersedes the Terms of a Contract.

Clearly, in affording these common use facilities, the City is engaged in a public utility function. A review of principles of law governing public utilities discloses that a rate for public utility service cannot be "frozen."

A contract of this type is entirely valid, when executed, in the absence of rate regulation. But the parties must be taken to have executed such contract in contemplation of the binding effect of rate regulation thereafter.

The decisions next mentioned fully support the conclusion that, with reference to common use facilities, the general schedule applicable to all must, as a matter of law, be applied to this contract.

Pinney and Boyle Company v. Los Angeles Ga. Etc. Corp. (1914), 168 Cal. 12, 18, 141 Pac. 620, Ann. Cas. 1915 D 471, L.R.A. 1915 C 282

This was a suit to enforce the terms of a contract entered into between plaintiff and defendant whereby plaintiff agreed to take for the operation of its machinery, and defendant agreed to supply, electricity

for that purpose. Defendant was engaged as a public utility in the supply of gas and electricity to the inhabitants of the City of Los Angeles. While this private contract between the parties litigant was in existence, and as the law then permitted, the City of Los Angeles, through its legislative body, regulated and prescribed the rates which the defendant public service corporation was permitted to charge consumers. Apparently, at the time of the contract, the rate-fixing power had not been exercised by the municipality.

The Supreme Court held that the fixation of rate thus adopted controlled over the terms of the contract. The Court ruled that a contract of such a nature must necessarily yield to a subsequent exercise of the rate-fixing power. This was upon the ground that the parties are conclusively deemed to have contracted with that result in view. On this subject, the Court said (top of p. 18):

> "A word perhaps should be added touching the asserted violation of the provision of the contract between the company and plaintiff by the enforcement of the terms of the regulatory ordinance. Upon this it is sufficient to say that it will be conclusively presumed that the parties contracted in contemplation of the power of the proper board or tribunal to fix rates in every case where such power exists and may have been thereafter legally exercised."

Numerous authorities, including those of the United States Supreme Court, are cited by the Court in support of the text just quoted.

It was argued by the plaintiff consumer in the *Los Angeles Gas Etc. Corp.* case that the legislative body undertook and had power only to fix maximum rates to be charged to the public and that, therefore, a private contract between the customer and the utility fixing a lower rate remained valid and enforceable. The Supreme Court's answer was that if such were to be the ruling, a primary purpose of rate regulation would be thwarted—the prevention of discrimination among consumers. In this connection, the Court stated (middle of p. 15):

> "The untenableness of this position, however, must become apparent when a moment's consideration is given to the fact that one of the primary and most important objects to be attained by rate regulation is the prevention of discrimination. It must be quite clear that to hold that the rate-fixing power goes no farther than to name an amount beyond which a charge may not be made leaves the utmost room for abuse by way of favoritism and discrimination within that limit. It is, in practical effect, a denial of the existence of the rate-fixing power, itself."

A holding, identical to that made in the case which has preceded, appears in

Law v. Railroad Commission (1921), 184 Cal. 737, 195 Pac. 423, 14 A.L.R. 249.

In that case, Law, a property-owner, entered into a contract for the supply of heat, power and illumination to his building. Subsequent to the contract, the Railroad Commission made an order directing that all steam-heat consumers be charged upon a schedule

of rates approved in that order. As to the effect of such order in abrogating rates previously fixed by private contract, the Supreme Court said (p. 739, bottom):

> "There is no longer any question as to the power of a state to fix rates for a public utility service which will supersede rates for such service previously fixed by private contract between the consumer and the company. It has been conclusively settled that the interference with private contracts by the state regulation of rates is but a legitimate effect of a valid exercise of the police power which neither impairs the obligation of a contract nor deprives of property without due process of law. (Atlantic Coast Line Ry. Co. v. Goldsboro, 232 U.S. 548, 558 (58 L.Ed. 721, 34 Sup. Ct. Rep. 364, see, also, Rose's U.S. Notes); Union Dry Goods Co. v. Georgia Public Service Corp., 248 U.S. 372 (9 A.L.R. 1420, 63 L. Ed. 309, 39 Sup. Ct. Rep. 117); Southern Pac. Co. v. Spring Valley Water Co., 173 Cal. 291 (L.R.A. 1917E, 680, 159 Pac. 865); Limoneira Co. v. Railroad Com., 174 Cal. 232 (162 Pac. 1033).) It is immaterial that petitioner's contract was entered into prior to the enactment of the present Public Utilities Act and the amendment thereto by which steam-heating service was included as a utility to be regulated. If the service contracted for was devoted to public use (Allen v. Railroad Com., 179 Cal. 68 (8 A.L.R. 249, 175 Pac. 466)), the contract for the service was subject to the exercise of the police power and, the state having elected to confer upon the commission the power to prescribe uniform rates for the service, petitioner cannot complain if the exercise of this

> power results in the practical annulment of his private contract fixing compensation for a public service. (Producers' Transp. Co. v. Railroad Com., 251 U.S. 228 (64 L.Ed. 239, 40 Sup. Ct. Rep. 131).)''

In *Market St. Ry. Co. v. Pacific Gas & Electric Co.* (Dist. Ct. N.D. Cal., 1925), 6 Fed. (2d) 633 (Appeal dismissed, 271 U.S. 691, 70 L.Ed. 1154), both utilities had expressed their willingness to abide by the terms of a contract for the supply of electrical energy. The Pacific Gas & Electric Company had applied to the Commission, then known as the Railroad Commission of California, for an increase in rates but excluded from its petition any increase with this particular consumer. The Railroad Commission, of its own initiative, provided that Market Street Railway Company should pay the increased rate which the Commission granted. Judge Kerrigan, in upholding this order of the Commission, ruled (p. 635, middle of column 2):

> ''The courts hold that all contracts relating to public service, entered into between the corporation operating a public utility and the private consumer, contain from the very nature of their subject-matter an implied reservation of the right of the state to lawfully exercise its police power for the general welfare, and that there is no impairment of the obligations of contract within the guaranties of the state or federal Constitution, even though said contract is thereby rendered partially or wholly invalid.'' (Citing authorities.)

There are many further California authorities in accord.

Sutter Butte Canal Co. v. Railroad Commission (1927), 202 Cal. 179, 259 P. 937 (Affirmed (1929) in United States Supreme Court), 279 U.S. 125, 73 L. Ed. 637;

Annotation: 74 L. Ed. at p. 305 (bottom) (Citing additional California cases.);

Annotation: 9 A.L.R. 1423.

Decisions of the Supreme Court of the United States are in accord.

Midland Realty Co. v. Kansas City Power and Light Co., 300 U. S. 109, 81 L. Ed. 540, 57 S. Ct. 345. (Rehearing denied at 300 U. S. 687.) 81 L. Ed. 888, 57 S. Ct. 504;

Union Drygoods Co. v. Georgia Public Service Corp., 248 U. S. 372, 63 L. Ed. 309, 37 S. Ct. 117, 9 A.L.R. 1420.

In an *Annotation* in 74 L. Ed. 234, the California and Federal cases on this subject, as well as the cases in other states, are exhaustively reviewed. The numerous authorities therein presented confirm the conclusions: (1) that public regulation of utility rate is a function within the police power; (2) that exercise of the police power, in future action, cannot be contracted away; (3) that every contract purporting to fix a rate between utility and customer must be taken to contemplate future exercise of the rate-fixing power; (4) that, consequently, every such contract is subject to exercise, thereafter, of the rate-fixing power.

B. Cases Relied on in Appellant's Brief to Negative This Principle of Public Utility Law Not Applicable.

TWA relies upon the decision in *St. Cloud Public Service Company v. St. Cloud* (1924), 265 U. S. 352, to support its contention that the rates and charges established by the Public Utilities Commission of the City and County of San Francisco for common use facilities at the airport are invalid insofar as TWA is concerned.

The *St. Cloud* case is cited by TWA as authority for the position that the City has either the power to regulate or contract concerning rates and charges for public service. The circumstances of the *St. Cloud* case do not apply here and the principle of public utility law that rates and charges supersede contract provisions should control.

It is true that in the *St. Cloud* case, the Supreme Court of the United States held that, under the circumstances of that case, a contract of the City of St. Cloud with the St. Cloud Public Service Company fixing the rate for sale of fuel gas to inhabitants of St. Cloud was valid and the company was prohibited from petitioning for an increase in the rate.

The Supreme Court construed provisions of Section 4 of the St. Cloud Municipal Charter which provides, in part, as follows:

> "The common council shall have full power by ordinance: . . . to provide for and control the erection and operation of gas works (etc.); to grant the right to erect, maintain and operate such works . . .; provided, . . . that the common council shall have authority to regulate and pre-

scribe the fees and rates and charges of any and all companies hereinbefore mentioned."

The Supreme Court stated that interpretations of the section as set forth in decisions of the Minnesota Supreme Court would control.

TWA quotes an identical portion of the decision in the *St. Cloud* case both on p. 30 and p. 35 of its brief. Immediately preceding the quotation from the case as contained in the TWA brief, the Supreme Court stated as follows (p. 359):

> "It is true that, standing alone, this proviso in the absence of any state decision to the contrary, would, under the construction given similar language in *Home Teleph. Co. v. Los Angeles,* 211 U. S. 274, 53 L. Ed. 183, 29 Sup. Ct. Rep. 50, be regarded as conferring authority merely to exercise the governmental power of regulating rates, and not authority to enter into a contract. In that case, however, it was pointed out that there was no other provision of the charter authorizing the city to contract as to rates . . ."

The omission of these two sentences of the opinion in the TWA brief is significant. City claims that the case at bar falls within the principles set forth in *Home Telephone Co. v. Los Angeles* mentioned in the portion of the opinion above quoted.

The only reference in the TWA brief to the case of *Home Teleph. Co. v. Los Angeles* (1908), 211 U. S. 265, 53 L. Ed. 176, is on p. 37 of its brief wherein it is stated (p. 37):

> "In *R.R. Comm'n v. Los Angeles R. Co.* (1929), 280 U.S. 145, 151, 153, and in *Home Telephone*

Co. v. Los Angeles (1908), 211 U. S. 265, 273, the Supreme Court stated the same rule as the *St. Cloud* case and other cases cited above, but held that under particular California statutes the city had no power to contract as to street railway rates in the one case and telephone rates in the other. In the case at bar the contracting authority of the City is clear."

The *Home Telephone* case presented a factual situation where the Telephone Company resisted the right of the City of Los Angeles to fix rates by ordinance under admitted powers contained in the Los Angeles City Charter on the ground that the City of Los Angeles had made a previous contract with the company covering the rate.

The Supreme Court of the United States upheld the powers of the City of Los Angeles to fix rates and charges by ordinance.

The Supreme Court stated as follows (p. 273):

"The surrender by contract of a power of government, though in certain well-defined cases it may be made by legislative authority, is a very grave act, and the surrender itself, as well as the authority to make it, must be closely scrutinized. No other body than the supreme legislature (in this case, the legislature of the state) has the authority to make such a surrender, unless the authority is clearly delegated to it by the supreme legislature. The general powers of a municipality or of any other political subdivision of the state are not sufficient. Specific authority for that purpose is required . . . "

* * * * * * *

(p. 274):

"The facts in this case which seem to us material upon the questions of the authority of the city to contract for rates to be maintained during the term of the franchise are as follows: The charter gave to the council the power 'by ordinance . . . to regulate telephone service and the use of telephones within the city, . . . and to fix and determine the charges for telephones and telephone service and connections.' This is an ample authority to exercise the governmental power of regulating charges, but it is no authority to enter into a contract to abandon the governmental power itself. It speaks in words appropriate to describe the authority to exercise the governmental power, but entirely unfitted to describe the authority to contract. It authorizes command, but not agreement. Doubtless, an agreement as to rates might be authorized by the legislature to be made by ordinance. But the ordinance here described was not an ordinance to agree upon the charges, but an ordinance 'to fix and determine the charges.' It authorizes the exercise of the governmental power and nothing else. We find no other provision in the charter which, by any possibility, can be held to authorize a contract upon this important and vital subject . . ."

* * * * * * *

(p. 278-279):

"All these cases agree that the legislative authority to the municipality to make the contract must clearly and unmistakably appear. It does not so appear in the case at bar. The appellant has failed to show that the city had legislative authority to make a contract of exemption from

the exercise of the power of regulation conferred in the charter. It therefore becomes unnecessary to consider whether such a contract in fact was made. The appellant's contention, that there was a violation of the obligation of its contract, must therefore be denied . . ."

In *Railroad Commission v. Los Angeles Railway Corporation* (1929), 280 U. S. 145, 74 L. Ed. 234, Los Angeles Railway Corporation brought a suit to abrogate rates fixed by its franchise with the City of Los Angeles.

The Supreme Court of the United States stated as follows (p. 151):

"The sole controversy is whether the company is bound by contract with the city to continue to serve for the fares specified in the franchises, it being conceded that the finding below respecting the inadequacy of the 5-cent fare is sustained by the evidence. Appellants contend that at all times the city had power to establish rates by agreement and that the franchise provisions constitute binding contracts that are still in force. On the other hand, the company maintains that the state never so empowered the city; and it insists that, if the power was given and any such contracts were made, they have been abrogated . . ."

* * * * * * *

(p. 152):

"This court is bound by the decisions of the highest courts of the states as to the powers of their municipalities. Georgia R. & Power Co. v. Decatur, 262 U.S. 432, 438, 67 L.Ed. 1065, 1073, 43 Sup. Ct. Rep. 613. Our attention has not been

called to any California decision, and we think there is none, which decides that the state legislature has empowered Los Angeles to establish rates by contract. This court is therefore required to construe the state laws on which appellants rely. As it is in the public interest that all doubts be resolved in favor of the right of the state from time to time to prescribe rates, a grant of authority to surrender the power is not to be inferred in the absence of a plain expression of purpose to that end. The delegation of authority to give up or suspend the power of rate regulation will not be found more readily than would an intention on the part of the state to authorize the bargaining away of its power to tax." (Citing cases.)

* * * * * * *

(p. 155):

"The appellants invoke provisions of the city charter which are printed in the margin. But it requires no discussion to show that they are not sufficient to empower the city by contract to establish rates . . . Appellants have failed to sustain their contention that the city was empowered to make such rate contracts."

Section 130 of the Charter of the City and County of San Francisco is a mandatory provision for fixing rates. No alternative power to either fix or contract concerning rates can be inferred from Sec. 130 of the Charter, or any other provision in the Charter of the City and County of San Francisco. San Francisco as well as Los Angeles is a "home rule city." Each city has a charter. A comparison of the Los Angeles Charter provisions mentioned in *Los Angeles Rail-*

road case and *Home Telephone Company* case on the right of the City to contract, and the provisions of the Charter of San Francisco in this respect are similar. The Supreme Court of the United States has held that such Charter provisions are not to be construed so as to give a municipal corporation the alternative power either to regulate rates of public utilities or make contract concerning special customers or consumers. When San Francisco has regulated charges for public utility service these charges are exclusive and embrace all consumers and customers.

Further, as pointed out in the decision of the District Court, the *St. Cloud* case involved a contract for a uniform rate to all customers served. The case between the City and TWA, the Court states, is a contract between one consumer and a public utility, not for the purpose of establishing a uniform rate to be charged all, but rather to establish a preferential position for one customer for twenty years.

TWA relies on *Femmer v. City of Juneau,* 97 Fed. 2d 694. The lease involved in that case fixed a set price for each ship that approached the wharf using the Juneau pier. Fees for dockage and wharfage were, however, fixed by schedule.

C. The Fixing of Rates Is a Legislative Act Under Police Power. The Rule of Administrative Construction Is Not Applicable.

TWA seeks to invoke the principle of administrative interpretation and thereby estop the City in the exercise of its police power from fixing and establishing rates and charges for common use facilities.

43 *Am. Jur.* 624, Sec. 83, defines the rate-making power as follows:

> "The function of rate making is purely legislative in character, whether it is exercised directly by the legislature itself by enacting of a law fixing rates or by the granting of a charter wherein the rates are regulated or is exercised by some subordinate administrative or municipal body to whom the power of fixing rates has been delegated; in any of such cases, the completed act derives its authority from the legislature and must be regarded as an exercise of the legislative power." (Citing cases.)

In *Mott v. Cline* (1927), 200 Cal. 434, 446, 253 P. 718, the Court said:

> " 'The police power, being in its nature a continuous one, must ever be reposed somewhere, and cannot be barred or suspended by contract or irrepealable law.' . . . It is to be presumed that parties contract in contemplation of the inherent right of the state to exercise unhampered the police power that the sovereign always reserves to itself for the protection of peace, safety, health and morals. Its effect cannot be nullified in advance by making contracts inconsistent with its enforcement." (Citing cases.)

The right to legislate cannot be estopped by actions of governmental officers or agencies.

See:

McKay v. Public Utilities Commission (1939), 104 Colo. 402, 91 Pac. (2d) 965, 973;

Caminetti v. Pac. Mutual L. Ins. Co. (1943), 22 Cal. (2d) 344.

In *State v. City of Gadsen* (1927), 113 So. 6, 8, 216 Ala. 243, the Court stated as follows:

> ". . . But, dealing with the question as one involving public interest, it will be conceded that, as a general rule, laches or neglect of duty on the part of officers of government—meaning in this case as viewed from appellant's standpoint, the failure of the municipal officers of Gadsden and Alabama City to insist that the territory in question be treated as part and parcel of the latter municipality—is no defense to a suit by it to enforce a public right or protect a public interest. *Utah Power Co. v. United States,* 243 U.S. 409, 37 S. Ct. 387, 61 L. Ed. 791; State ex rel. Lott v. Brewer, 64 Ala. 298. The basis of the rule as thus announced is the principle that everyone who deals with an officer or agent of the government must, at his peril, inquire into the extent of their power, and we have no doubt that principle was correctly applied in the cases just cited. It is unreservedly conceded that the state cannot, by the operation of any mere estoppel in pais, be deprived of its right to legislate. Nor can claims against the state be created by estoppel."

In *Sanitary District of Chicago v. United States* (1925), 266 U.S. 405, 69 L. Ed. 352, the Supreme Court of the United States stated as follows:

> "A state cannot estop itself by grant or contract from the exercise of its police power."

IV.

THE TERMS OF THE TWA AGREEMENT ARE SUCH AS TO SUBJECT RATES AND CHARGES FOR COMMON USE FACILITIES TO THE GENERAL SCHEDULE OF RATES AND CHARGES IN EFFECT IN THE AIRPORT.

A. Terms of the 1942 Agreement.

As demonstrated in Sections I, II and III, agreements are subject to the general principle of public utility law that a rate for public utility service cannot be frozen by contract. This, it is submitted, is a complete answer to appellant's claims in its brief. An intention on the part of contracting parties to freeze rates is inoperative as a matter of law. However, as a second answer to the claim that rates and charges for common use facilities were frozen by the October, 1942, agreement, it is shown in this part of the brief, there was not even the intention to freeze the rates and charges for common use facilities. This is evidenced (1) by the words of the agreement itself and (2) by construction of applicable provisions of the Charter of the City and County of San Francisco as it existed in 1942.

The following items in analysis of the October 1, 1942, agreement are according to the numbered sections thereof.

1. The document describes an area of demised premises "together with improvements thereon including Hangar No. 4 on said airport and adjoining shop space." (Section 1.) It is therein specified that the rental is to be at the rate of $2,204 per annum for Hangar No. 4, and $1,026 per annum for adjoin-

ing shop space, payable in advance in equal monthly installments. This rental agreement is subject to adjustment at the end of each five year period.

2. Space is provided for at a minimum area on the ground floor at the present Terminal Building and the right is conferred upon the lessee to available additional space.

3. Section 3 is directly concerned in this litigation. The first paragraph reads as follows:

> "Lessor further demises and lets unto Lessee the use, in common with others authorized so to do and *on the same terms and conditions as apply to others,* of any and all general facilities, improvements, equipment and services which have been or may hereafter be provided at said San Francisco Municipal Airport, including, but without limitation, the landing field, runways, aprons, taxi-ways, sewerage and water facilities, marker and surface lights, floodlights, landing lights, signals, beacons, aids, control tower, and other conveniences for loading, flying, landings and take-offs; and the causeways, docks, wharves and approaches thereto, parking areas, roads, streets, bridges, spur tracks, and other facilities and appurtenances of said Airport, for the Lessee, its employees, passengers, guests, vendors and contractors, patrons, and invitees, which use without limiting the generality thereof, shall include (all of said facilities to be used and occupied in accordance with the rules and regulations of said Airport):"

There follows in Section 3 an enumeration of the various rights granted to the lessee. These may be

briefly summarized in accordance with the designated numbers in the document: (1) operation of an air transportation system; (2) repairing, servicing and parking of aircraft or other equipment; (3) incidental training of personnel and testing of aircraft or other equipment; (4) landing, taking off, parking, loading and unloading, and the right to store aircraft in any hangar of lessor at the same rates charged to others; (5) right to use motor conveyances with right to designate carrier transporting its passengers; (6) right to maintain communications system in demised premises; (7) right to conduct any other operation necessary in air transportation business.

Section 3 then proceeds, in the paragraph immediately following: "For *such* rights, uses and privileges, Lessee shall pay Lessor for each schedule as hereinafter defined, the following fees: first, second and third schedules, $150.00 per month per schedule, and for all additional schedules, $50.00 per month per schedule." Thereafter follow certain additions to the charges based upon further schedules or additional weight beyond 25,500 pounds. These charges *are* in accordance with the Schedule of Rates and Charges adopted by Public Utilities Commission Resolution No. 4474 on June 23, 1941 (prior to the TWA lease) and thereafter approved by the Board of Supervisors. (Exh. R-1–R-4; Tr. 623).

However, these charges are *not* in accordance with the Schedule of Rates and Charges effective September 1, 1946 (Part IV) (Exh. S-1–S-4; Tr. 624), which imposes rates upon a basis per unit of dispos-

able load, or with the further Schedule of Rates and Charges effective January 1, 1951 (Part III) (Exh. E; Tr. 55) which imposes rates on the basis of maximum gross weight of plane.

Section 3 further provides that, in the event lower or more favorable charges or fees are levied against other air carriers, then the charges and fees provided for shall be accordingly reduced.

13. Section 13 provides as follows:

> "Except as otherwise expressly provided for in this lease and agreement, no charges or fees of any kind shall be charged or imposed by Lessor directly or indirectly, against Lessee or its employees, passengers, guests, vendors, patrons or invitees, for or on account of any of the rights or privileges granted to or to be enjoyed by Lessee, its employees, passengers, guests, vendors, patrons, and invitees, as provided in this lease and agreement."

"Common use facilities" are such facilities as are specified in Section 3 of the lease referred to above such as runways, taxiways, sewerage and waterways floodlights, landing lights, service from the control tower, and other facilities furnished to air carriers and operators of private and industrial airplanes in general and necessary *in joint utilization* among the airlines and aircraft owners for the profitable operation of the airport.

It is to be noted that further in Section 3 the lessee is charged certain sums per number of schedules for *such rights.* It is in addition in Section 3 provided

at the inception thereof, that the lessee is "to utilize those common uses *on the same terms and conditions as apply to others.*"

The contention of TWA at the trial of this case was that the equivalence of "terms and conditions" as between the named lessee, TWA and "others", means only terms and conditions as to operations and that these words are not intended to comprehend uniformity of charges for common use facilities. In fortification of this argument TWA cited Section 13 above quoted.

However, the phrase from Section 3, italicized above—"on the same terms and conditions"—is just as effective in an imposition of charges for these facilities as if such charges were set forth in the lease in precise terms of dollars and cents. This is true because the general schedule of charges applicable to all is obviously the intended governing factor. The quoted phrase—"the same terms and conditions as apply to others"—has been consistently interpreted by the courts as inclusive of any term in the related agreement or agreements.

Words and Phrases (Perm. Ed.) Vol. 41, p. 399.

B. Charter Provisions Relating to Leases.

There is another and conclusive reason for the interpretation of the lease in such manner as not to afford, within any "rental" charge, use, without conforming to Schedule of Rates and Charges additional charge, of the aprons, runways and common use facilities.

Section 93 of the *Charter* enacts that

> ". . . the public utilities commission may provide by resolution, that lands now devoted to airport purposes or lands that may hereafter be acquired and devoted to airport purposes may be leased or rented for a period not to exceed forty years and the director of property shall arrange for such lease to the highest responsible bidder at the highest monthly or annual rent, and thereafter the administration of any and all such leases shall be by the public utilities commission; provided, however, that no such lease shall be made to any other public utility without the approval of the board of supervisors by two-thirds vote thereof."

This charter section has no pertinency as far as the October 1942 lease with TWA is concerned. With the exception of the final proviso, *that portion relating to airport leases was enacted by charter amendment ratified by the Legislature in 1946.* Hence, it was not in effect at the time of the execution of the TWA lease in 1942.

There was then no special provision for the leasing of airport property *in 1942.* Such provision for the leasing of airport property did not enter the charter *until 1946.* The TWA lease, therefore, fell under the category of the first paragraph of Section 93 of the charter, which provides for the leasing of real property in instances where the land "is not required for the purposes of the department." This part of the section restricts the period of the lease to 20 years. It is significant that TWA lease was for that length of time. The 1946 amendment to the Charter provided

for a 40-year period for airport leases. It is apparent that the TWA lease was drawn by virtue of municipal authority conferred under the first paragraph of Section 93—the only applicable provision in effect at that time. But the Charter, as it stood at that time, provided in Section 123:

> "The board of supervisors shall have power to lease or sell any public utility or *any part thereof;* provided that any ordinance or *other measure* involving the lease or sale of any public utility or *part thereof,* except as provided in sections 92 and 93 of this charter . . . must be referred and submitted to a vote of the electors of the city and county at the election next ensuing . . ." (Emphasis ours).

The TWA lease was not submitted to the electors.

Sections 92 and 93 deal respectively with sales and leases. Section 93 (in paragraph 1) deals alone with property *not required* for the purposes of the department. Obviously, the various common use facilities, such as aprons, runways and the like *are* required for the purposes of the department.

TWA, in effect, argues that, *by virtue of the terms of its lease,* it is entitled to the right to common use facilities *under the rental charge* included as a term of the lease. In other words, the contention is that it has *leased* this right.

If the foregoing offered construction were adopted, it would render void the TWA lease, inasmuch as there was no submission to the voters.

On the other hand, if the conception is taken that TWA has leased land and space only with obligation

to pay for public utility services in common use a regularly established rates for all, then it is to b concluded that the TWA lease is valid.

V.

CLAIM OF TWA THAT CITY IS NOT CONDUCTING A "MUNICI PAL AFFAIR" IN THE OPERATION OF A MUNICIPAL AIR PORT IS NOT TRUE.

TWA, in its brief (pp. 20, 25), advances the argu ment that the City had the right to contract relativ to rates and charges for common use facilities unde the provisions of California Municipal and Count Airport Law (Cal. Stats., Chapt. 267, p. 485) becaus the operation of the airport is not a municipal affai and therefore, if there is inconsistency between th State statute and Charter provisions, the State statut controls.

The fundamental principle is correct. Where municipality avails itself of the provisions of Articl XI, Sections 6 and 8 of the California Constitutio and becomes a chartered city (as San Francisco di by adopting a charter in effect January 8, 1932), it power over municipal affairs becomes all-embracin restricted and limited by the charter only, and fre from any interference of the State through gener laws. The city becomes independent of general law upon municipal affairs.

West Coast Advertising Co. v. San Francis (1939), 14 Cal. 2d 516, 95 P. 2d 138;

Kennedy v. Ross (1946), 28 Cal. 2d 569, 170 I 2d 904.

The fallacy in the TWA position is the statement hat the City and County of San Francisco does not wn and operate the airport as a "municipal affair." o cases are cited by TWA to substantiate this claim. *x parte Houston* (1950), 193 Okla. Crim. 26, 224 P. d 281 (p. 25, Appellant's Brief) is the only case ted by TWA relating to a municipal airport. The ecision in this case is contrary to the contention of WA.

Commencing with the leading case, *Hesse v. Rath,* 9 N.Y. 436, 164 N.E. 342, it has universally been eld by the courts that a city which owns and operates n airport performs this function as a matter of local oncern and is governed by the law applicable to mat- rs which concern the municipality exclusively as a local concern" or "municipal affair."[3]

In *Krenwinkle v. City of Los Angeles* (1935), 4 Cal. d 611, the operation and maintenance of an airport y the City was directly raised. The State Supreme ourt stated at page 614:

> "The conduct and maintenance of an airport by a municipality is a public enterprise, not 'purely

[3]See *Ebrite v. Crawford,* 215 Cal. 724, where the Court stated: Municipalities may exercise certain extraterritorial powers when e possession and exercise of such powers are essential to the oper conduct of the affairs of the municipality." See also *City Wichita v. Clapp,* 125 Kan. 100, 263 P. 12; *Dysart v. St. Louis,* Mo. 514, 11 S. W. 2d 1045; *City of Ardmore v. Excise Board* 932), 155 Okla. 126, 8 P. 2d 2; *State v. Clausen* (1930), 157 ash. 457, 289 P. 61; and *City and County of Denver v. Board Commissioners, Etc.* (1945), 113 Colo. 150, 156 P. 2d 101, wherein e Court stated at page 103: "The fact that the General Assembly as authorized cities and towns generally to construct, operate and aintain airports within five miles of their boundaries makes their nstruction, operation and maintenance within such limits a unicipal purpose."

commercial or industrial'. No better statemen of this proposition has been called to our atten tion than is found in the discussion of the subjec by Mr. Justice Cardozo in Hesse v. Rath, 24 N. Y. 436 [164 N. E. 342]. Because of the ad vance in the science of aviation, and the univer sally recognized need of making provision fo navigation of the air, a quotation from the opin ion is here appropriate: 'A city acts for cit purposes when it builds a dock or a bridge or street or a subway. (Sun Printing & Pub. Assr v. New York, 152 N. Y. 257 [46 N. E. 499, 3 L. R. A. 788].) Its purpose is not different whe it builds an airport. (Wichita v. Clapp, 125 Kar 100 [263 Pac. 12, 63 A. L. R. 478].) Aviation i today an established method of transportatio The future—even the near future—will make i still more general. The city that is without th foresight to build the ports for the new traff may soon be left behind in the race of compet tion.' "

It necessarily follows, therefore, that the San Fra cisco International Airport is governed by the pr visions of the Charter of the City heretofore cite These provisions are exclusive and the case must b decided according to Charter law and not gener State law on any related subject matter.

VI.

PROPER NOTICE OF HEARING TO ESTABLISH A RATE SCHEDULE WAS GIVEN ACCORDING TO LAW.

Section 130 of the City Charter provides in pa as follows:

"Before adopting or revising any schedule of rates or fares, the commission shall publish in the official newspaper of the city and county for five days notice of its intention so to do and shall fix a time for a public hearing or hearings thereon, which shall be not less than ten days after the last publication of said notice, and at which any resident may present his objection to or views on the proposed schedule of rates, fares or charges."

Prior to enactment by the Public Utilities Commission of the schedules of rates and charges here involved, notice of intention so to do was in each instance duly published in the official newspaper of the City and County of San Francisco. A public hearing was held in accordance with the published notice. After the hearing the Public Utilities Commission adopted schedules of rates and charges. The schedules were thereafter submitted to the Board of Supervisors and duly approved by that body at its regular meeting. This procedure was followed in connection with the 1951 schedule of rates and charges. TWA does not dispute this statement (Appellant's Brief, p. 12) (See Exhibits T-1–T-4, Tr. 22).

The 1942 agreement called for the leasing of specified real property for twenty years. "The use in common with others" of the "common use facilities" as set forth in Section 3 were continuously subject to regulation under Section 130 of the Charter.

The following decisions hold that in the absence of a charter provision no notice was required. It

must be admitted, however, that the City did give notice of hearings to change the schedule of rates and charges in accordance with Section 130 of the Charter. The City has fulfilled the requirements of law in revising the rates and charges for common use facilities at the airport.

In *Eagle-Pitcher Lead Co. et al. v. Henryetta Gas Co.* (1925), 112 Okla. 65, 239 Pac. 890, one of the contentions raised was that the commission was without authority to make the order, raising the rates from 4¢ per thousand to approximately 7¢ per thousand, for the reasons that the Okmulgee Producing and Refining Company was not a party to the proceeding and was given no formal notice of the same; and, that said refining company was a necessary party for the reason that the increase in gas rates fixed by the commission resulted in the abrogation of certain contracts binding on the refining company.

The Court answering the above question said *as to notice* on page 893:

> "Under the procedure adopted and followed by the Corporation Commission in the trial of such causes, no specific form of formal pleadings are required. The one thing essential to give jurisdiction is notice, and no specific form of notice in such proceedings are necessarily essential. . . . That proceedings of this character are legislative in their nature, as well as judicial and that the rule governing the procedure in courts of law are not necessarily applicable or applied with such strictness as they are in lawsuits.
>
> "In the case of *Prentis v. Atlantic Coast Line Co.,* 211 U.S. 210, 29 S.Ct. 67, 53 L.Ed. 150, the

Supreme Court of the United States, when considering a provision of the constitution of Virginia, which created the corporation commission of that state, and defines its power and duties, said: 'The establishment of a rate is the making of a rule for the future, and therefore is an act legislative not judicial in kind.' "

The California Supreme Court in the case of *San Diego Water Co. v. San Diego* (1897), 118 Cal. 556, 565, 566, *on the question of notice* lays down the following rule:

"On the other hand, the plaintiff contends that section 1 of article XIV of the constitution of this state is opposed to the constitution of the United States, in that it operates to deprive the water company of its property without due process of law. It is argued that no provision for the fixing of water rates by the tribunal thereby created can be valid without notice to those whose rights are to be affected, and an opportunity to them to appear and defend, the right to which must be given by the constitution itself. That no such notice or hearing is provided for must be admitted; but the consequence contended for does not follow.

"But we think that the true construction of that section is such that it is not open to the constitutional objection urged, even if raised by one who at the time of its adoption was engaged in that business. It obviously was not the intention of the framers of that provision to make any distinction between rights then existing and those to be thereafter acquired, nor can we attribute to them any intention of confiscating private property. The meaning of the section is,

that the governing body of the municipality, upon a fair investigation, and with the exercise of judgment and discretion, shall fix reasonable rates and allow just compensation. If they attempt to act arbitrarily, without investigation, or without the exercise of judgment and discretion, or if they fix rates so palpably unreasonably and unjust as to amount to arbitrary action, they violate their duty and go beyond the powers conferred upon them. Such was the conclusion reached by this court in *Spring Valley Water Works v. San Francisco,* 82 Cal. 286, 16 Am. St. Rep. 116, to which conclusion we adhere."

The Supreme Court of the United States in *Home Telephone & Telegraph Co. v. Los Angeles* (1908), 211 U.S. 265, 53 L. Ed. 176, 29 S. Ct. 50, states *as to notice:*

"The appellant also contends that the ordinances fixing rates are wanting in due process of law, and therefore violate the 14th Amendment of the Constitution of the United States, because the section (31) of the charter, under whose authority they were enacted, does not expressly provide for notice and hearing before action. But rate regulation is purely a legislative function and, even where exercised by a subordinate body upon which it is conferred, the notice and hearing essential in judicial proceedings and, for peculiar reasons, in some forms of taxation (see *Londoner v. Denver,* 210 U.S. 373, 52 L.Ed. 1103, 28 Sup. Ct. Rep. 708), would not seem to be indispensable. It may be that the authority to regulate rates, conferred upon the city council by §31 of the charter, is not an authority, arbitrarily, and without investigation, to fix rates of

charges, and that, if charges were fixed in that manner, the act would be beyond the authority of the council. It is not unlikely that the California courts would give this construction to the ordinance. *San Diego Water Co. v. San Diego,* 118 Cal. 556, 38 L.R.A. 460, 62 Am. St. Rep. 261, 50 Pac. 633. Acting within the authority thus limited it would seem that the character and extent of the investigation made and notice and hearing afforded, in the exercise of this legislative function, would be left to the discretion of the body exercising it. It must not be forgotten that, presumably, the courts of the states, and certainly the courts of the United States, are open to those who complain that their property has been confiscated by an act of regulation of this kind, and that the latter courts will, under all circumstances, determine for themselves whether such confiscation exists. But we need not now decide whether notice and hearing were required. Both were given in this case. An ordinance of the city provided that the rates should be fixed at a regular and special meeting of the city council held during the month of February of each year, and another ordinance, as has been shown, required the telephone company to render annually, in the month of February, to the city council, a statement of its receipts, expenditures, and property employed in the business,—facts which would be material on the question of fixing reasonable rates. This shows that a sufficient notice and hearing were afforded to the appellant, if it had chosen to avail itself of them, instead of declining to furnish all information, as it did. If notice and an opportunity to be heard were indispensable, which we do not decide, it is

enough that, although the charter be silent, such notice and hearing were afforded by ordinance, as in this case. So, it was held in *Paulsen v. Portland,* 149 U.S. 30, 38, 37 L.Ed. 637, 640, 13 Sup. Ct. Rep. 750, and it was held in *San Diego Land & Town Co. v. National City,* 174 U.S. 739, 43 L. Ed. 1154, 19 Sup. Ct. Rep. 804 that the kind of notice and hearing (in that case provided by statute) which the ordinance in this case afforded was sufficient. For these reasons the contention of the appellant on this part of the case is denied."

CONCLUSION.

In conclusion, it is respectfully submitted that the judgment and decree of the District Court should be affirmed.

Dated, San Francisco, California,
April 29, 1955.

Respectfully submitted,
DION R. HOLM,
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THOMAS M. O'CONNOR,
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(Appendix Follows.)

Appendix.

Appendix

In the United States District Court
For the Northern District of California,
Southern Division

Civil No. 30,326

Trans World Airlines, Inc., formerly known as Transcontinental & Western Air, Inc., a Delaware corporation,
Plaintiff and Cross-Defendant,
vs.
City and County of San Francisco, a California municipal corporation, et al.,
Defendants and Cross-Complainants.

ROCHE, District Judge: Plaintiff is a corporation which in the course of its business utilizes land and facilities so that its airplanes may land, take off, and be serviced and stored.

Defendant, represented by its Public Utilities Commission, business operator of the San Francisco Airport, in 1942 entered into a 20 year lease agreement with the plaintiff to furnish the land and facilities so used.

Twice during the life of this lease between the parties litigant, the Public Utilities Commission of the City regulated and prescribed rates which plaintiff and the other airlines were to pay for using the airport.

The rates prescribed by the Public Utilities Commission were higher than the rates fixed by the lease of plaintiff and defendant. Plaintiff refused, and still refuses to pay these higher rates, insisting that the limits of its liability are the charges fixed by the lease. Defendant has advised plaintiff that it must pay under the schedule of rates and charges, and that in default of such payments the airline will be deprived of certain facilities at the airport. This action for declaratory relief followed.

The City contends that the rates in the schedules are enforceable only as they apply to landings, take-offs, and other common use facilities; as to those properties not used in common it is admitted that the lease controls. The questions advanced may be summarized as follows:

(1) Does the furnishing of common use facilities at the airport to the airlines constitute a public utility service?

(2) Does the Public Utilities Commission of the City have rate-making jurisdiction over the airport?

(3) Does the law allow a public utility to depart from the regular schedule of rates and charges by contract?

(4) Does the doctrine of commercial frustration apply to the facts of this case?

1. Public Utility Function.

In the total design of the airport "common use facilities" are installed which are available in the operation of all aircraft. These are the runways, where planes land and take off; the landing aprons or ramps where passengers and cargo are taken on and discharged; the taxi-ways which connect the runways with the loading aprons or ramps; and other conveniences and facilities such as lights, signals, beacons, control tower, etc., shared by all airline companies utilizing the airport. The defendant maintains that the utilization of the enumerated areas and facilities involves the provision of a public utility service to the airlines as customers of this service.

Plaintiff counters with the proposition that the public to be served by the airport is the general public which uses it; that these people, and not the airlines, are the true customers of the airport's facilities. To support its argument plaintiff points out that 3,250,000 members of the general public used the airport last year, but that only 12 airlines are parties to the contracts entered into for facilities. However, the fact that only relatively few airlines use the service does not control the question. The number using the service may be few in number. *Camp Rincon Resort Co. v. Eshleman* (1916) 172 Cal. 561, 158 Pac. 186. Indeed, the fact that only one customer uses the services rendered does not control

the question. *Ford Hydro-Electric Co. v. Town of Aurora* (1932) 240 N. W. 418, 206 Wis. 316.

What does control then? The factor which as far as the public is concerned which determines whether an agency is a public utility, is whether all persons, many or few, corporate or individual, who from the nature of the service rendered are in a position to require it, have a right to be supplied the service on equal terms. *Allen v. R. R. Commission* (1918) 179 Cal. 68, 175 Pac. 466. The limitations of place, requirements, ability to pay and other facts determine the customers that will use a particular service. *Terminal Taxicab Co. v. Kuntz* (1916) 241 U. S. 252, 60 L. Ed. 984.

Plaintiff cites the cases of *Marin Water Co. v. Town of Sausalito* (1914) 168 Cal. 587, 143 Pac. 767, and *Del Mar Water Co. v. Eshleman* (1914) 167 Cal. 666, 140 Pac. 591, as instances where the court found that the contracting parties were not in a relationship of public utility and customer. In the Marin Water case a water company contracted to supply a municipality with a bulk supply of water for 10 years. The municipality in turn sold the water to its inhabitants. The question raised was whether the water company was functioning as a public utility in supplying the City with water under this contract. This case is inapplicable as it involves a sale in bulk of a commodity from one utility to another. In the instant case there is a continuing service rendered by one utility to another, this latter utility being a member of the general public served.

The Del Mar case is also distinguishable. The court found in this case that the utility had not offered its water to the general public. The sale of water to the 17 inhabitants of the town of Del Mar was on a per barrel basis. It was like the private sale of water by a farmer having a well in his backyard. This case is limited to cases presenting similar facts.

The public function of a municipal airport is recognized in many cases, *State ex rel. City of Lincoln v. Johnson* (1928) 117 Neb. 301, 220 N. W. 273; *State v. Jackson* (1929) 121 Ohio St. 186, 167 N. E. 396; *Price v. Storms, et al., Board of Trustees, Town of Okewah* (1942) 191 Okla. 410, 130 Pac. (2d) 523; *Jones v. Keck* (1946) 74 Ohio App. 549, 74 N. E. (2d) 644; *City of Toledo v. Jenkins* (1944) 143 Ohio St. 141, 54 N. E. (2d) 656; *State v. Board of County Commissioners* (1947) 149 Ohio St. 583, 79 N. E. (2d) 698. In the case of *Toledo v. Jenkins,* cited supra, the court stated, "The statutory provisions confer upon the municipal corporation power to own or lease and operate landing fields and improve them with runways, buildings or other structures, so as to make them fully equipped aircraft and transportation terminals. As an airport of that character is a public utility (*State ex rel. Chandler v. Jackson,* 121 Ohio St. 186, 167 N. E. 396), the Toledo Municipal Airport was and is a complete public utility."

The San Francisco Airport has been built with public funds for the public use. It is the determination of this court that this use is twofold. On one hand for the use of the air-traveling public, and on

the other, for the use of those individuals and corporations using the airport for their aircraft. Certainly this latter group is more restricted than the former, but this fact does not mitigate against the public utility function of the City as regards the common use facilities. These facilities are offered to the airline companies as customers of the airport; they are offered as a public utility service.

2. Rate-Fixing Power of the San Francisco Public Utilities Commission Over the San Francisco Airport.

Section 121 of the charter of the City and County of San Francisco gives the Public Utilities Commission jurisdiction over the airport, and provides in part:

"The public utilities commission shall have charge of the construction, management, supervision, maintenance, extension, operation and control of all public utilities and other properties used, owned, acquired, leased or constructed by the city and county, including airports, for the purposes of supplying any public utility service to the city and county and its inhabitants, to territory outside the limits of the city and county, and to the inhabitants thereof."

The rate-fixing power of the Public Utilities Commission is found in Section 130 of the charter, which provides in part:

"The commission shall have the power to fix, change and adjust rates, charges or fares for the furnishing of service by any utility under its jurisdic-

tion, and to collect by appropriate means all amounts due for said service, and to discontinue service to delinquent consumers and to settle and adjust claims arising out of the operation of any said utilities.

Rates may be fixed at varying scales for different classes of service or consumers. The commission may provide for the rendition of utility service outside the limits of the city and county and the rates to be charged therefor which may include proportionate compensation for interest during the construction of the utility rendering such service."

No confusion should arise by reason of the coincidence that the rate-fixing body in this case happens to be the Public Utilities Commission, also having jurisdiction over the utility itself. In entering the lease the Public Utilities Commission was acting proprietarily. In the exercise of its rate-fixing power the Commission is acting as a public rate-fixing body even though it is engaged in a function as operator of the utility. *Connett v. City of Jerseyville,* 110 Fed. (2d) 1013. In California a municipality has the power to fix rates and charges of municipally owned utilities. *Durant v. City of Beverly Hills* (1940) 39 Cal. App. (2d) 133, 102 Pac. (2d) 739; *Jochimsen v. City of Los Angeles* (1921) 54 Cal. App. 715, 202 Pac. 902; *Bowles v. City and County of San Francisco* (1946) 64 Fed. Supp. 609; *City of Pasadena v. Railroad Commission* (1920) 183 Cal. 526, 192 Pac. 25.

The approved charter of a municipality is a law of the state and has the same force and effect as a law enacted by the legislature. *Yosemite, etc. v. State*

Board of Equalization (1943) 59 Cal. App. (2d) 39. Under Section 130 of the charter the Public Utilities Commission is empowered to establish rates and charges for the furnishing of utility services outside the limits of the city and the rates to be charged therefor. In order for the services of an airport to be rendered outside the limits of a municipality it necessarily follows that the airport be constructed outside the boundaries of the municipality.

Plaintiff contends that the police power of the city, including its rate-fixing power ceases at its borders, and that only a proprietary power may be exercised beyond its borders. *South Pasadena v. Terminal Ry. Co.* (1895) 109 Cal. 319, 41 Pac. 1093; *Incorporated Town of Sibley v. Ocheydan Electric Co.* (1922) 194 Iowa 950, 187 N. W. 560; *City of Colorado Springs v. Colorado City* (1908) 42 Colo. 75, 94 Pac. 316. This is true except in those cases where the legislature has provided for the exercise of this power. The charter of the city, approved by the legislature, specifically provides for the exercise of this power, and therefor the Public Utilities Commission has jurisdiction to set the rates and charges for the common use facilities at the airport.

3. Departure From the Prescribed Rates by Contract.

It is this court's decision that in affording the common use facilities at the airport to the airlines that the City is engaged in a public utility function. Plaintiff contends that, notwithstanding this fact, the City

can by lease agreement fix with each individual airline using the airport the charges for these facilities and services for a definite term.

Plaintiff cites two Supreme Court cases, *Home Telephone Co. v. Los Angeles* (1908) 211 U. S. 265, and *Public Service Co. v. St. Cloud* (1924) 265 U. S. 352, as instances where a public utility was held to have entered into a binding contract for the furnishing of a utility service at a fixed charge. Both cases are distinguishable from the instant case.

The charges fixed by contract in both of these cases were applicable not to any one consumer alone, but to all members of the public served. In other words, any member of the public utilizing the public utility service offered had a right to be served at the same price paid by those similarly situated. In the instant case the lease agreement constitutes nothing more than a contract between *one* consumer, and a public utility, not for the purpose of establishing a uniform rate to be charged all members of the public using the utility, but rather to establish a preferential position for this one consumer for twenty years. A contract of this type is entirely valid when executed, and is binding in the absence of rate regulation by the Public Utilities Commission acting on behalf of the public. Any intention on the part of the parties to fix charges not subject to regulation is inoperative as a matter of law. The decisions next mentioned fully support the conclusion that, with reference to the common use facilities, the general schedule applicable to all must as a matter of law, be applied to this contract.

The case of *Pinney & Boyle Co. v. Los Angeles Gas Co.* (1914) 168 Cal. 12, 141 Pac. 620, decided by the Supreme Court of this state is in point. This was a suit to enforce the terms of a contract entered into between plaintiff and defendant whereby the plaintiff agreed to take for operation of its machinery, and defendant to supply electricity for that purpose. Defendant was engaged as a public utility in the supply of electricity to the inhabitants of the City of Los Angeles. While this private contract between the parties was in existence, the City of Los Angeles, through its legislative body, regulated and prescribed the rates which the defendant public service corporation was permitted to charge consumers. Apparently, at the time of the contract, the rate-fixing power had not been exercised by the municipality.

The court held that the fixation of the rate thus adopted controlled over the terms of the contract. The court ruled that a contract of such nature must necessarily yield to a subsequent exercise of the rate-fixing power. This was on the ground that the parties are deemed to have contracted with that result in view. A holding, identical to that made in the case which has preceded appears in *Law v. Railroad Commission* (1921) 184 Cal. 737, 195 Pac. 423.

Various other decisions of the Supreme Court of California are in accord. *Leavitt v. Lassen Irrigation Co.* (1909) 157 Cal. 82, 106 Pac. 404; *Limoneira Co. v. Railroad Commission* (1917) 174 Cal. 232, 162 Pac. 1033.

Decisions of the Supreme Court of the United States are in accord. *Midland Realty Co. v. Kansas City Power and Light Co.,* 300 U. S. 109, 81 L. Ed. 540, 57 S. Ct. 345; *Union Drygoods Co. v. Georgia Public Service Corp.,* 248 U. S. 372, 63 L. Ed. 309, 37 S. Ct. 117, 9 A.L.R. 1420. See also, Annotation 74 L. Ed. 234 reviewing both the California and Federal cases on this subject.

Plaintiff contends that it would be unfair for this court to declare the lease inoperative, and to hold it subject to the prescribed rates and regulations of the Public Utilities Commission. The reason put forth is that plaintiff would not have entered into a lease of hangar space without having fixed with the City in advance the charges as to the common use facilities. This argument is without merit. If it were not a manufacturer might well argue that he would not have leased a factory for 20 years except for the fact that he was able to fix by contract the price of his electricity and water for the same period. Clearly if a contract had been entered into for these utility services at a fixed rate, subsequent regulation by the proper body, would affect the charges agreed upon.

The fact that the City is both the lessor of hangar space and the provider of the common use facilities does not change the holding in this case. The hangars are constructed and leased so that the customers of the City at the airport (the airlines) can better avail themselves of the common facilities offered. This in no way affects the holding that the airport, as far as the common use facilities are concerned, is offering

a public utility service, the rates for which can be set by the Public Utilities Commission of San Francisco.

4. Commercial Frustration as a Defense.

The City as a distinct and separate defense contends that the "doctrine of commercial frustration" should apply in this case, thus enabling the City to avoid the lease agreement with plaintiff.

It is evident from the testimony and documentary evidence presented in this case that this defense is without merit.

In accordance with the foregoing it is Ordered

1. That Trans World Airlines, Inc., account to the defendants and cross-complainants in this action as to the extent of its operations to and from San Francisco Airport from and after December 31, 1950.

2. That judgment be entered herein in favor of defendants, on findings of fact and conclusions of law, and that the injunction pendente lite be denied.

3. That judgment in favor of cross-complainants be entered herein in an amount to be determined. Counsel is directed to prepare findings of fact and conclusions of law in conformance with the opinion. Each party to pay its own costs.